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## WISCONSIN LEGISLATIVE COUNCIL AMENDMENT MEMO

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| <b>2001 Assembly Bill 254</b>                       | <b>Assembly Substitute<br/>Amendment 1</b> |
| Memo published: October 22, 2001                    |  |
| Contact: Don Dyke, Senior Staff Attorney (266-0292) |  |

### **BACKGROUND**

Under current law, an attorney of record in a civil action or special proceeding has express authority to issue a subpoena to compel the attendance of a witness for a deposition, hearing or trial. [s. 805.07 (1), Stats.] In addition, an attorney of record may also issue a subpoena to compel the attendance of a witness in a state or local administrative contested case. [See, generally, ss. 68.11 (2) and 227.45 (6m), Stats.]

Currently there is no express authority for the attorney of a defendant in a criminal proceeding to issue a subpoena. Section 885.01, Stats., in pertinent part, authorizes a judge, clerk of court or court commissioner to issue a subpoena requiring the attendance of a witness. [s. 885.01 (1), Stats.] District attorneys also have subpoena authority under that provision. [s. 885.01 (2), Stats.] The provisions of ch. 885 expressly apply to criminal proceedings. [s. 972.11 (1), Stats.]

Section 972.11 (1), Stats., provides: “. . . the rules of evidence and practice in civil actions shall be applicable in all criminal proceedings unless the context of a section or rule manifestly requires a different construction.” Apparently, the lack of express authority for a criminal defendant’s attorney to issue a subpoena to compel the attendance of a witness and the contrasting express authority for court officials and district attorneys to issue subpoenas in criminal proceedings has led to the conclusion that a judge, clerk of court, or court commissioner must issue the subpoena for the defendant. Assembly Bill 254 seeks to clarify the ability of the attorney for a defendant in a criminal proceeding to issue a subpoena to compel the attendance of a witness.

### **ASSEMBLY SUBSTITUTE AMENDMENT 1**

Assembly Bill 254, as originally drafted, combines the authority of an attorney in a civil action or criminal action to issue a subpoena. Thus, under the bill, a subpoena may be signed and issued “By an attorney of record in a civil action, criminal action, or special proceeding, to require the attendance of

a witness for a deposition, hearing, or trial in the action or special proceeding.” That authority has been read to expand the discovery available in a criminal action to include the authority to require the attendance of a witness for a deposition. Discovery in criminal proceedings is limited and does not generally include depositions. [See, s. 971.23, Stats.]

The substitute amendment clarifies that the proposal only intends to authorize the issuance of a subpoena by an attorney of record in a criminal action or proceeding and is not intended to expand discovery in criminal actions or proceedings.

Assembly Substitute Amendment 1 was recommended for adoption by the Assembly Committee on Judiciary by a vote of Ayes, 8; Noes, 0.

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